

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of Validation Proceeding to Determine the Regularity and
Legality of Multnomah County Home Rule Charter Section 11.60 and
Implementing Ordinance No. 1243 Regulating Campaign Finance and
Disclosure

MULTNOMAH COUNTY
Petitioner-Appellant,

and

ELIZABETH TROJAN, MOSES ROSS, JUAN CARLOS ORDONEZ,
DAVID DELK, JAMES OFSINK, RON BUEL, SETH ALAN WOOLLEY,
and JIM ROBINSON,
Intervenors-Appellants,

and

JASON KAFOURY,
Intervenor,

v.

ALAN MEHRWEIN, PORTLAND BUSINESS ALLIANCE, PORTLAND
METROPOLITAN ASSOCIATION OF REALTORS, and ASSOCIATED
OREGON INDUSTRIES,
Intervenors-Respondents.

Multnomah County Circuit Court No. 17CV18006
Court of Appeals No. A168205
Supreme Court No. S066445

BRIEF OF *AMICUS CURIAE*
PLANNED PARENTHOOD ADVOCATES OF OREGON

Continued

August 2019

Steven C. Berman, OSB No. 951769
Nadia H. Dahab, OSB No. 125630
Lydia Anderson-Dana, OSB No.
166167
Stoll Stoll Berne Lokting & Shlachter
PC
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
sberman@stollberne.com
ndahab@stollberne.com
landersondana@stollberne.com

*Attorneys for Amicus Curiae
Planned Parenthood Advocates of
Oregon*

Jenny Madkour, OSB No. 982980
Katherine Thomas, OSB No. 124766
Multnomah County Attorney's Office
501 SE Hawthorne Blvd., Suite 500
Portland, OR 97214
Telephone: (503) 988-3138
jenny.m.madkour@multco.us
katherine.thomas@multco.us

*Attorneys for Petitioner-Appellant
Multnomah County*

Linda K. Williams, OSB No. 784253
10266 SW Lancaster Road
Portland, OR 97219
Telephone: (503) 293-0399
linda@lindawilliams.net

*Attorney for Intervenors-Appellants
Elizabeth Trojan, David Delk, and
Ron Buel*

Daniel W. Meek, OSB No. 791242
10949 SW 4th Avenue
Portland, OR 97219
Telephone: (503) 293-9021
dan@meek.net

*Attorney for Intervenors-Appellants
Moses Ross, Juan Carlos Ordonez,
James Ofsink, Seth Alan Woolley, and
Jim Robinson*

Gregory A. Chaimov, OSB No.
822180
Davis Wright Tremaine LLP
1300 SW Fifth Avenue, Suite 2400
Portland, OR 97201
Telephone: (503) 778-5328
gregchaimov@dwt.com

Attorney for Intervenors-Respondents

Denis M. Vannier, OSB No. 044406
Senior Deputy City Attorney
Portland Office of City Attorney
1221 SW 4th Avenue, Suite 430
Portland, OR 97204
Telephone: (503) 823-4047
denis.vannier@portlandoregon.gov

*Attorneys for Amicus Curiae
City of Portland*

Ellen F. Rosenblum, OSB No. 753239
Attorney General
Benjamin Gutman, OSB No. 160599
Solicitor General
Carlson L. Whitehead, OSB No.
105404
1162 Court Street NE
Salem, OR 97301-4096
Telephone: (503) 378-4402
benjamin.gutman@doj.state.or.us
carson.l.whitehead@doj.state.or.us

*Assistant Attorney General
Attorneys for Amicus Curiae
Kate Brown, Governor*

Adam Kiel, OSB No. 091231
Kafoury & McDougal
411 SW 2nd Avenue, Suite 200
Portland, OR 97204
Telephone: (503) 224-2647
kiel@kafourymcdougal.com

*Attorney for Amicus Curiae Derek
Cressman; Sightline Institute; Unite
Oregon; Asian Pacific American
Network of Oregon (APANO);
Portland Jobs with Justice; Alliance
for Democracy, Portland; Portland
Forward; Bernie PDX; League of
Women Voters of Oregon; and League
of Women Voters of Portland*

Cody Hoesly, OSB No. 052860
121 SW Morrison Street, Suite 700
Portland, OR 97204
Telephone: (503) 222-4424
choesly@lvklaw.com

*Counsel for Amici Curiae Independent
Party of Oregon, Oregon Progressive
Party, Pacific Green Party, and
Honest Elections Oregon*

Kelly K. Simon, OSB No. 154213
P.O. Box 40585
Portland, OR 97240
Telephone: (503) 227-3186
ksimon@aclu-or.org

Katherine McDowell, OSB No. 89087
McDowell Rackner Gibson PC
419 SW 11th Avenue, Suite 400
Portland, OR 97205
katherine@mrg-law.com

Daniel Belknap Bartz, OSB No.
113226
3418 Kinsrow Avenue #175
Eugene, OR 97401
danielbbartz@gmail.com

*Attorneys for Amicus Curiae
American Civil Liberties Union
Foundation of Oregon, Inc.*

TABLE OF CONTENTS

I.	INTEREST OF <i>AMICUS CURIAE</i>	1
II.	SUMMARY OF ARGUMENT.....	1
III.	LEGAL, FACTUAL AND HISTORICAL BACKGROUND.....	3
	A. Multnomah County Measure 26-184 (2016)	3
	B. The Court’s Prior Decisions Prohibiting Campaign Contribution and Expenditure Limits	4
	C. Measure 47 (2006)	6
	D. Referendum 401 (2020)	8
	E. Issues Raised by Multnomah County on Appeal	9
IV.	ARGUMENT.....	10
	A. A Decision From This Court Before November 2020 Could Influence the Outcome of Referendum 401.....	10
	B. If the Court Revisits Its Opinion in <i>Vannatta I</i> , the Public Would Benefit From Immediate Guidance As to How Its Decision Impacts Measure 47 (2006).....	16
V.	CONCLUSION	19

TABLE OF AUTHORITIES

Cases

<i>Citizens United v. Federal Election Commission</i> 558 US 310, 130 S Ct 876, 175 L Ed 2d 753 (2010)	8
<i>Dennis v. United States</i> 341 US 494, 71 S Ct 857, 95 L Ed 1137 (1951)	11
<i>Deras v. Myers</i> 272 Or 47, 535 P2d 541 (1975).....	4, 5, 6, 15
<i>Farmers Ins. Co. of Oregon v. Mowry</i> 350 Or 686, 261 P3d 1 (2011).....	16
<i>Hazell v. Brown</i> 352 Or 455, 287 P3d 1079 (2012).....	6, 7, 18
<i>Lucas v. Forty-Forth Assembly of State of Colorado</i> 377 US 713, 84 S Ct 1459, 12 L Ed 2d 632 (1964)	12
<i>Markley v. Rosenblum</i> 362 Or 531, 413 P3d 966 (2018).....	7, 8, 18
<i>McCutcheon v. Federal Election Commission</i> 572 US 185, 134 S Ct 1434, 188 L Ed 2d 468 (2014)	8
<i>Putnam v. Norblad</i> 134 Or 433, 293 P2 940 (1930).....	12
<i>State ex rel. Carson v. Kozar</i> 126 Or 641, 270 P3d (1928).....	12
<i>State v. Robertson</i> 293 Or 402, 649 P2d 569 (1982).....	5
<i>State v. Stoneman</i> 323 Or 536, 920 P2d 535 (1996).....	5
<i>Sterling v. Cupp</i> 290 Or 611, 625 P2d 123 (1981).....	16
<i>Vannatta v. Keisling</i> 324 Or 514, 931 P2d 770 (1997).....	<i>passim</i>

Vannatta v. Oregon Government Ethics Com'n

347 Or 449, 222 P3d 1077 (2009).....5, 17

StatutesOregon Constitution, Article I, § 8 *passim*Oregon Constitution, Article II, § 8..... *passim*

ORS 33.710.....3

Other Authorities

Multnomah County Measure 26-184.....3, 14

Multnomah County Ordinance No. 1243 *passim*Senate Joint Resolution 18..... *passim*

I. INTEREST OF *AMICUS CURIAE*

Planned Parenthood Advocates of Oregon (“PPAO”) is an independent, non-partisan, non-profit organization. PPAO advocates for public policy that will enhance and protect reproductive healthcare by building support and accountability among elected officials in Oregon, and by engaging and motivating the public. PPAO conducts educational and electoral activity including public education campaigns, grassroots organizing and legislative advocacy. PPAO actively participates in statewide ballot measures that would impact access to reproductive healthcare including, most recently, as one of the leaders of the No Cuts to Care campaign, the coalition that led the opposition to Measure 106 (2018).

PPAO is engaged in conversations with the public it serves, legislators and stakeholders regarding campaign finance reform in Oregon. PPAO wants to ensure the campaign finance reform process is transparent and that the public it advocates for has a voice and role in any campaign finance reform that is made in Oregon. PPAO also wants to ensure that there is clarity to any changes that are made, so that the public’s participation in future elections is not hampered. Accordingly, PPAO has a strong interest in the issues impacted by this case surrounding campaign and election conduct.

II. SUMMARY OF ARGUMENT

PPAO is not aligned with any party in this proceeding. PPAO takes no position on the constitutionality of the Multnomah County ordinance regulating campaign contributions and expenditures and imposing disclosure requirements at issue in this case. PPAO similarly takes no position on the Court’s holdings

that campaign contribution and expenditure restrictions violate the rights of expression embodied in the Oregon Constitution. PPAO appears as *amici* to address: (1) whether the Court should issue an opinion in this case before the Oregon electorate has had the opportunity to vote on a referendum at the November 2020 General Election to amend the Oregon Constitution to allow campaign contribution and expenditure limits, and disclosure requirements, such as those at issue here; and (2) the impact this Court's decision could have on Measure 47 (2006).

It is well-settled Oregon law that campaign contribution and expenditure limits implicate the freedom of expression guarantees in the Oregon Constitution. The Oregon legislature recently voted to refer to the voters an amendment to Article II, section 8 that explicitly would allow campaign contribution and expenditure limits. That measure – Referendum 401 – will be on the November 3, 2020 General Election ballot. A decision in this case before the November 2020 General Election effectively could usurp the will of the voters and would impact the election and campaign surrounding that measure. Because courts traditionally seek to avoid issuing decisions that could affect issues that properly have been placed before the voters, the Court may want to consider refraining from issuing an opinion in this case until after the November 2020 General Election, to allow the voters to first decide whether the Oregon Constitution should allow campaign contribution and expenditure limits.

Measure 47 (2006) imposes campaign contribution and expenditure limits that violated the Oregon Constitution when that measure was passed.

Measure 47 (2006) contains a provision providing that if the Court reverses its prior decisions holding contribution and expenditure limits unconstitutional restraints on expression, Measure 47 (2006) will go into effect. If this Court revisits its prior decisions in this case, the Court should be explicit in its opinion as to the impact on Measure 47 (2006). Without guidance, campaigns, candidates and donors could find themselves in a state of regulatory chaos with no clarity as to the applicable law in the months leading up to the November 2020 election.

III. LEGAL, FACTUAL AND HISTORICAL BACKGROUND

A. Multnomah County Measure 26-184 (2016)

At the November 2016 General Election, Multnomah County voters approved Measure 26-184. That measure amended the Multnomah County charter to establish campaign contribution limits, expenditure and independent expenditure limits, and disclosure requirements for Multnomah County elected offices. The Multnomah County Board of County Commissioners subsequently adopted Ordinance 1243, incorporating Measure 26-184 into the county code. Multnomah County then initiated a validation proceeding pursuant to ORS 33.710 seeking a determination as to whether the provisions incorporated into the county code by Ordinance 1243 are consistent with the Oregon and United States Constitutions. The trial court held that the contribution limits, expenditure and independent expenditure limits and disclosure requirements in Ordinance 1243 violate Article I, section 8. Because the trial court determined that those provisions of Ordinance 1243 ran afoul of the Oregon Constitution,

the trial court did not address the issues raised under the United States Constitution.

The trial court entered a general judgment on June 22, 2018. Multnomah County timely appealed to the Court of Appeals. On December 12, 2018, Intervenors moved to certify this case to this Court. The Court accepted certification. Oral argument is set for November 1, 2019.

B. The Court’s Prior Decisions Prohibiting Campaign Contribution and Expenditure Limits

For over four decades, the Court consistently has held that campaign contributions and expenditures are expression protected by the Oregon Constitution. *Deras v. Myers*, 272 Or 47, 535 P2d 541 (1975) addressed the constitutionality of two statutes that limited campaign expenditures. While questioning the appropriateness of a balancing test, the Court concluded “that the public interests served by the adoption of [the statutes] are clearly outweighed by the citizen interest protected under Article I, ss 8 and 26.” *Deras*, 272 Or at 54. “Overarching” the Court’s analysis was that the challenged legislation “impedes important channels of communication on public issues and thus denies citizens freedom of expression.” *Id.* at 62. In other words, in *Deras* the Court concluded that contribution expenditures are protected expression.

In 1994, voters approved Measure 9, which adopted campaign contribution and expenditure limits. In a challenge to those limits, the Court held that campaign contributions are protected expression and reaffirmed that campaign expenditures also are protected expression. *See Vannatta v. Keisling*,

324 Or 514, 525, 931 P2d 770 (1997) (“*Vannatta I*”)¹ (“we conclude that both campaign contributions and expenditures are forms of expression for the purposes of Article I, section 8”)(footnote omitted). In a lengthy discussion, the Court rejected the argument that contribution and expenditure limits were permissible under Article II, section 8 on the tenuous basis that the word “elections” as used in that provision did not encompass campaigns that precede elections.² *Vannatta I*, 324 Or at 528-535.³ Using the methodology set forth in *State v. Robertson*, 293 Or 402, 412, 649 P2d 569 (1982) as modified by *State v. Stoneman*, 323 Or 536, 543, 920 P2d 535 (1996),⁴ the Court then held that

¹In *Vannatta v. Oregon Government Ethics Com’n*, 347 Or 449, 222 P3d 1077 (2009), *cert den*, 560 US 906 (2010) (*Vannatta II*) the Court addressed whether certain restrictions on gifts to legislators violated the free expression provisions of the Oregon Constitution. Although *Vannatta II* is not material to the issues raised in this brief, appellants and their aligned *amici* discuss both *Vannatta I* and *Vannatta II* in their briefs. In order to avoid confusion, PPAO uses those same designations in this case.

²See *Vannatta I*, 324 Or at 529 (“[t]he Secretary of State would have us construe ‘elections’ to include *all* activities that occur during political campaigns[, b]ut the two concepts do not necessarily overlap so completely”) (emphasis in original); *id.* at 531 (“in order to keep faith with the ideas imbedded in Article II, section 8, we should construe ‘elections’ to refer to those events immediately associated with the act of selecting a particular candidate or deciding whether to adopt or reject an initiated or referred measure”).

³Article II, section 8 provides: “The Legislative Assembly shall enact laws to support the privilege of free suffrage, prescribing the manner of regulating, and conducting elections, and prohibiting under adequate penalties, all undue influence therein, from power, bribery, tumult, and other improper conduct.”

⁴In *Vannatta I*, the Court acknowledged that its Article I, section 8 jurisprudence had evolved in the two-decades following the Court’s decision in *Deras*. “*Deras* provides little assistance in conducting an Article I, section 8, inquiry under this court’s current jurisprudence.” *Vannatta I*, 324 Or at 520. See also *id.* at 519 n. 8 (acknowledging that Court subsequently rejected balancing test used in *Deras*).

the contribution limits in Measure 9 were restrictions on expression that violated Article I, section 8. *Vannatta I*, 324 Or at 541.

C. Measure 47 (2006)

During the November 2006 General Election, voters considered two companion campaign finance measures. Measure 46 (2006) would have amended Article I, section 8 to allow campaign contribution and expenditure limits, effectively overruling *Deras* and *Vannatta I*. Measure 47 (2006) imposed statutory campaign contribution and expenditure limits. *See generally Hazell v. Brown*, 352 Or 455, 287 P3d 1079 (2012) (discussing those measures). The proponents of Measure 47 (2006) “were clearly cognizant of the constitutional barriers that could hinder implementation of the measure if it were enacted without substantive changes to either the Oregon Constitution or this court’s prior interpretation of that document’s free expression clause.” *Hazell*, 352 Or at 463. Accordingly, Measure 47 (2006) contained a contingency providing it would go into effect “at the time that the Oregon Constitution is found to allow, or is amended to allow, such limitations.” Measure 47 (2006), § 9(f). Voters rejected Measure 46 (2006) but approved Measure 47 (2006). *Hazell*, 352 Or at 458, 463.

Supporters of Measure 47 (2006) subsequently sued the Secretary of State, seeking a declaration that as to the validity of the measure. *Hazell*, 352 Or at 464. The Court rejected the challenge, finding that the contingency in section 9(f) of Measure 47 (2006) had not been met. *Id.* at 470. The Court explained that Measure 47 (2006) was an “all or nothing” proposition, and voters did not intend for only part of Measure 47 (2006) to go into effect at

some future date. *See, e.g., Hazell*, 352 Or at 465 (“the voters intended and understood that, if and when Measure 47 becomes operative, it would do so as a whole piece of legislation, not in some piecemeal fashion”). The Court also rejected “as unpersuasive” the argument that the contingency in section 9(f) should be severed from Measure 47 (2006) because that provision “would allow the otherwise dormant law to become operative by inadvertence, surprise, or an arbitrary event completely decoupled from any expression of assent by the voters or their representatives.” *Hazell*, 352 Or at 468. As the Court explained:

“We have concluded that Measure 47 will become effective as a whole or it will not become effective. We have explained that Oregon voters intended Measure 47 to remain inoperative absent a constitutional amendment like Measure 46, or a controlling judicial construction of Article I, section 8, that effectively reverses Vannatta I. Measure 47 will not, therefore, spring to life based on events that are arbitrary, difficult to describe, or unpredictable. If either of the contingencies noted above occurs, Measure 47 will become effective according to the expressed will of the voters and under terms that they intended. A change of that magnitude will not take place in a closet.”

Id. at 468-469 (emphasis added).

The Court recently discussed *Hazell* and Measure 47 (2006) in *Markley v. Rosenblum*, 362 Or 531, 413 P3d 966 (2018). At issue in *Markley* was the ballot title for Initiative Petition 28 for the November 3, 2018 General Election. IP 28 (2018) would have amended Article I, section 8 to allow laws to regulate campaign contributions and expenditures. All sections of the certified ballot title for IP 28 (2018) provided that if the initiative were to pass “Measure 47 (from 2006) becomes law.” *Markley*, 362 Or at 534. On review, the Court wrote that “the Attorney General’s statement that Measure 47 (2006) ‘becomes law’ is inaccurate because the effect that IP 28 will have on Measure 47 (2006)

is at best speculative.” *Markley*, 362 Or at 536. In reaching that holding, the Court reiterated one of the party’s arguments that:

“even if Measure 47’s limitations on campaign contributions and expenditures would have complied with the First Amendment when the measure was put before the voters in 2006, it is extremely unlikely that those limits would survive First Amendment scrutiny now in light of the United States Supreme Court’s intervening decisions in *McCutcheon v. Federal Election Commission*, [572] U.S. [185], 134 S.Ct. 1434, 188 L. Ed. 2d 468 (2014), and *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S.Ct. 876, 175 L. Ed. 2d 753 (2010).”

Markley, 362 Or at 543. The Court explained that “if Measure 47 (2006) is not consistent with the First Amendment (and the Attorney General does not dispute that there is a significant question it is),” it would be highly improbable that under IP 28 (2018)’s proposed amendment to Article I, section 8, Measure 47 “will be revived.” *Id.* at 544.

D. Referendum 401 (2020)

On July 3, 2019, the legislature referred Senate Joint Resolution (SJR) 18 to the voters for the November 3, 2020 General Election. SJR 18 would amend Article II, section 8 of the Oregon Constitution to allow the legislature, as well as any local government, to “enact laws or ordinances within its jurisdiction” that:

(a) Limit contributions made in connection with political campaigns or to influence the outcome of any election in a manner that does not prevent candidates and political committees from gathering the resources necessary for effective advocacy;

(b) Require the disclosure of contributions or expenditures made in connection with political campaigns or to influence the outcome of any election;

(c) Require that an advertisement made in connection with a political campaign or to influence the outcome of any election identify the persons or entities that paid for the advertisement; and

(d) Limit expenditures made in connection with political campaigns or to influence the outcome of any election to the extent permitted under the Constitution of the United States.

SJR 18 (2019), ¶ 1, § 8(2). The amendment to Article II, section 8 would apply to any law or ordinance enacted on or after January 1, 2016. SJR 18 ¶ 1, § 8(3).⁵ That would include Multnomah County Ordinance No. 1243. In other words, the amendments made to Article II, section 8 by SJR 18 – to allow campaign contribution and expenditure limits, and disclosure requirements – would apply to the ordinance at issue in this proceeding.

SJR 18 has been designated as Referendum 401 for the November 3, 2020 General Election.

E. Issues Raised by Multnomah County on Appeal

Multnomah County does not ask the Court to address all the provisions of Ordinance No. 1243 that the trial court held unconstitutional. Rather, Multnomah County “seeks a declaration that [Multnomah County Code] 5.021, which limits the amount and method of making or receiving campaign contributions, is constitutional under Article I, section 8, of the Oregon Constitution and the First Amendment to the United States Constitution.” Appellant Multnomah County’s Opening Brief at 2. Multnomah County is not seeking review of the trial court’s decision as to the unconstitutionality of the expenditure and independent expenditure limits in Ordinance 1243.⁶ *Id.* at 2-3,

⁵The text of SJR 18 (2019) is available at <https://olis.leg.state.or.us/liz/2019R1/Downloads/MeasureDocument/SJR18/Enrolled> (accessed August 7, 2019).

⁶*See also* Appellant Multnomah County’s Opening Brief at 50-51 (acknowledging that the expenditure limits in Ordinance 1243 are difficult to reconcile with recent United States Supreme Court decisions interpreting the First Amendment to the United States Constitution and “in the light of that federal case law, resolution of the status of expenditures – and regulations of

50-51. Multnomah County also is not seeking review of the trial court’s ruling that the disclosure provisions in Ordinance No. 1243 are unconstitutional, and that issue may be moot.⁷ *Id.* at 9-10.

IV. ARGUMENT

A. A Decision From This Court Before November 2020 Could Influence the Outcome of Referendum 401.

Referendum 401 (2020) represents a legislative determination to let the voters decide whether to allow restrictions on campaign contributions and expenditures. The measure is an opportunity for voters to choose whether they want to limit their rights to expression currently guaranteed by the Oregon Constitution as interpreted by the Court.

The legislative history for SJR 18 is clear that the legislature intends for the measure to amend the constitution to work around the Court’s decision in *Vannatta I*. The staff measure summary explicitly referenced and cited that opinion as the controlling authority on campaign finance laws and recognized that the legislation “amends section 8, Article II of the Oregon Constitution to

those expenditures similar to the County’s – under Article I, section 8, of the Oregon Constitution is best left for another case”).

⁷In a June 10, 2019 ruling in a validation proceeding regarding a City of Portland ordinance similar to Ordinance 1243, the same trial court judge who heard this case found the City of Portland’s disclosure requirements were constitutional under an historical exception to Article I, section 8. Multnomah County acknowledges that the City of Portland’s disclosure requirements are more detailed than those in Ordinance No. 1243 and do not “present vagueness issues” similar to those in the disclosure requirements in Ordinance No. 1243. Appellant Multnomah County’s Opening Brief at 9-10. “In the light of that ruling, the County is not assigning error to the judge’s ruling on the disclosure provision of the Ordinance (MCC 5.203) in the County case.” *Id.* at 10. Instead, the County intends to amend its disclosure provision to eliminate the vagueness concerns and make it consistent with the City of Portland’s disclosure provision.

allow regulation of moneys in political campaigns if approved at the next primary^[8] election.” SJR 18 A Staff Measure Summary, Senate Committee on Campaign Finance, March 27, 2019 (available at <https://olis.leg.state.or.us/liz/2019R1/downloads/MeasureAnalysisDocument/46422>) (accessed August 7, 2019). *See also* SJR 18 B Staff Measure Summary, House Committee on Rules, June 29, 2019 (available at <https://olis.leg.state.or.us/liz/2019R1/downloads/MeasureAnalysisDocument/52286>) (accessed August 7, 2019) (providing that measure would amend constitution to allow campaign finance restrictions currently prohibited by *Vannatta I*). The legislature has concluded that it is an appropriate use of its authority to put Referendum 401 before the voters and to let the voters address whether currently prohibited campaign contribution and expenditure limits should become permissible under the Oregon Constitution.

When a court decision could impact or foreclose an issue pending before the voters, courts may properly exercise restraint and let the voters first address the issue.

“Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. * * * Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.”

Dennis v. United States, 341 US 494, 525, 71 S Ct 857, 95 L Ed 1137 (1951) (Frankfurter, J., concurring). When the Supreme Court refused to intercede in a

⁸SJR 18 subsequently was amended to place the referendum on the November 2020 ballot.

redistricting dispute before voters would get to consider two competing redistricting measures in an upcoming election, Chief Justice Warren wrote:

“[T]he fact that a practicably available political remedy, such as initiative and referendum, exists under state law provides justification only for a court of equity to stay its hand temporarily while recourse to such a remedial device is attempted or while proposed initiated measures relating to legislative apportionment are pending and will be submitted to the State’s voters at the next election.”

Lucas v. Forty-Forth Assembly of State of Colorado, 377 US 713, 737, 84 S Ct 1459, 12 L Ed 2d 632 (1964).

This Court similarly has expressed reluctance about intervening when the legislature places matters before the voters. For example, in *Putnam v. Norblad*, 134 Or 433, 440-41, 293 P2 940 (1930), the Court declined to interfere in the legislature’s authority to schedule a special election. “Suffice it to say, it is not appropriate for the court to interfere or thwart the scheme of the Legislature.” 134 Or at 444. As the Court explained

“It is a well-settled doctrine that political questions are not within the province of the judiciary, except to the extent that power to deal with such questions has been conferred by express constitutional or statutory provision. It is not always easy to define the phrase ‘political question’ nor to determine what matters fall within its scope, but, in the present case, it seems clear that the election of a senator and the calling of an election for that purpose is closely related to a purely political matter.”

Id. at 440-441. *See also State ex rel. Carson v. Kozar*, 126 Or 641, 647, 270 P3d 513 (1928) (“[s]ince under the amendment of the Constitution, the people have reserved to themselves the power to enact law, the power resides in the people, and any attempted interference by the courts in the exercise of their

power, where all the requirements of statute have been complied with, would be a mere usurpation upon the part of the courts”).

A decision in this case before November 2020 would not wholly interfere with the voters’ ability to approve or reject whether the constitution should be amended to allow state and local laws regulating campaign contributions, such as Multnomah County Ordinance No. 1243. No party is seeking to prevent the Court from placing Referendum 401 (2020) on the ballot. However, a decision from this Court before the November 2020 election could dramatically impact the outcome of Referendum 401 (2020). For example, if the Court applies its reasoning and rationale in *Vannatta I* and concludes that the campaign contribution and expenditure limits in Multnomah County Ordinance No. 1243 violate the Oregon Constitution, Referendum 401 (2020)’s backers could use that decision as a political tool to motivate support for the referendum. If the Court instead retreats from its prior case law and concludes that the campaign and expenditure limits are permissible under the Oregon Constitution, then voters who would otherwise be motivated to vote for the referendum might be disinclined to vote for the measure, since their vote would have no practical impact.

A decision from this Court before the November 2020 election also could create a constitutional predicament. As discussed above, for over four decades the Court has held that campaign finance restrictions are inconsistent with the freedom of expression guarantees of the Oregon Constitution. If the Court were to determine before the November 2020 election that its prior decisions were in error, the Court effectively would be telling voters the Court was wrong to

prohibit campaign contributions and expenditures. Yet, if voters subsequently were to *reject* Referendum 401 (2020), the implication would be that Oregonians approve the Court’s prior decisions rejecting limits and do not want limits. That predicament could be avoided if voters are allowed to voice their preference before a Court opinion is issued here.

Voter approval of Referendum 401 (2020) also could render this case moot. As discussed above, in *Vannatta I* the Court rejected the argument that Article II, section 8 allowed for contribution and expenditure regulation, because Article II, section 8 applies only to “elections,” and not to campaigns. Referendum 401 (2020) would resolve that issue. It unambiguously allows regulation of contributions and expenditures “made in connection with political campaigns or to influence the outcome of any election.” SJR 18, ¶ 1, § (8)(2)(a), (b). And, the referendum specifically provides that it applies to local measures and laws – such as Multnomah County Measure 26-184 (2016) and Multnomah County Ordinance No. 1243 – adopted after January 1, 2016.

A decision from this Court in this case before the November 2020 election also unintentionally may undermine the public’s perception of the legitimacy of the Court. When the Court accepted certification of this case, there was no implication that the Court could be interfering in an election because the legislature had not yet referred Referendum 401 (2020). However, Oregonians now have the opportunity to decide whether they want to amend the constitution to allow campaign contribution and expenditure limits. For Oregon voters, Oregon’s prohibition on campaign contribution and expenditure limits arise from judicial interpretations of the Oregon Constitution. Referendum 401

(2020) is an opportunity for the legislature and voters to clarify the text of the constitution to change the law as interpreted by *Deras* and reinforced by *Vannatta I*. Referendum 401 (2020) allows voters to voice their desire to change the constitution to overrule this Court's prior holdings. A decision from the Court could be perceived as taking that opportunity away from voters after it has been given to them.

There is no immediate urgency that requires a decision from the Court before the November 2020 election. At issue in this case is the constitutionality of a handful of provisions of Multnomah County Ordinance No. 1243. Multnomah County seeks review only of the campaign contribution limits in Ordinance No. 1243. The County has eight elected officers -- five county commissioners, a sheriff, a District Attorney and an auditor. Two commission seats and the District Attorney's position will be on the May 2020 ballot. *See* Multnomah County Charter, § 11.15(4) (elections for Multnomah County officers to occur during the May primary). Barring unforeseen circumstances, no other seats will be up for election until 2022. In other words, for the foreseeable future, a decision from this Court would impact, at most, only three local races.⁹

⁹A pre-November 2020 decision from this Court may not even affect those three races. The election on those races will occur at the May 19, 2020 primary. There will be a subsequent November 2020 election only if a candidate does not win a majority in the May 2020 primary. This case will be submitted to the Court for consideration after argument on November 1, 2019. While it is possible that the case could be resolved far enough in advance of the May 2020 primary to affect contributions to those races, it frequently takes more than a few months to resolve complex constitutional questions.

The Court has a long-standing history of first addressing whether a challenged government action violates the Oregon Constitution before considering federal constitutional issues. *See Sterling v. Cupp*, 290 Or 611, 614, 625 P2d 123 (1981) (describing first-things-first approach). In so doing, the Court has developed a body of law interpreting provisions of the Oregon Constitution independently of their federal corollaries. This approach has been particularly pronounced and developed in the area of free expression. The Court’s Article I, section 8 jurisprudence is strongly revered by practitioners, the judiciary and academics. This case may not present the best opportunity for the Court to revisit that legacy. “In the area of constitutional interpretation, our cases emphasize that decisions should be stable and reliable because the Oregon Constitution is the fundamental document of this state.” *Farmers Ins. Co. of Oregon v. Mowry*, 350 Or 686, 693-694, 261 P3d 1 (2011) (internal quotation marks omitted; citation omitted). Voter approval of Referendum 401 (2020) would render a decision in this case and the need to revisit well-settled case law unnecessary.

B. If the Court Revisits Its Opinion in *Vannatta I*, the Public Would Benefit From Immediate Guidance As to How Its Decision Impacts Measure 47 (2006).

A decision from this Court could implicate Measure 47 (2006). Measure 47 (2006) imposed campaign contribution and expenditure limits that violate Article I, section 8 (or at least violated Article I, section 8 as interpreted by the Court at the time the measure passed). As discussed above, subsection 9(f) of Measure 47 (2006) provides that Measure 47 (2006) “shall become effective at the time that the Oregon Constitution is found to allow, or is amended to allow,

such limitations.” Appellants and their aligned *amici* ask the Court to overrule *Vannatta I*.¹⁰ Yet, none mention, much less discuss, the impact overturning *Vannatta I* could have on Measure 47 (2006) or the confusion that could cause in advance of the November 2020 election.

A decision from this Court may well come on the eve of the November 2020 General Election, or least well into campaign season. As the Court is aware, the November 2020 General Election is quite significant and promises to be contentious on the federal, state and local levels. Candidates and committees already have begun fundraising, and expenditures already have been made. Even if this Court were to decide this case within a few months after argument, many candidates and campaigns already will have made financial commitments for television, radio and social media time and will have hired (or agreed to hire) contractors and employees to provide campaign services. In other words, by the time the Court issues a decision, candidates and campaigns will be deeply engaged in the activities Measure 47 (2006) purports to regulate.

If this Court chooses to revisit *Vannatta I* in this case in advance of the November 2020 General Election, campaign finance reform advocates and opponents will scour the Court’s opinion for its potential impact on Measure 47

¹⁰See, e.g. Appellant Multnomah County’s Opening Brief at 20 (“This case presents this Court with the opportunity to * * * clarify that the effect of *Vannatta II* was to overrule the statement in *Vannatta I* that contributions are protected expression and constitute speech of the contributor”); Opening Brief of Intervenor-Appellants Elizabeth Trojan, David Delk and Ron Buel at 4 (“*Vannatta I* should be reconsidered”); *id.* at 38-64 (arguing that *Vannatta I* was wrongly decided); Brief on the Merits of Amici Curiae Independent Party of Oregon, Oregon Progressive Party, Pacific Green Party & Honest Elections Oregon at 10-13) (arguing that “*Vannatta I* was ill-considered” and that “[t]he time is ripe to overrule it”).

(2006). Reform advocates will no doubt assert that Measure 47 (2006) is in full force and effect. Reform opponents will argue that Measure 47 (2006) remains inactive. Donors, candidates and campaigns will struggle without definitive guidance as to what they can and cannot do. Litigation will ensue. Given the timeline, it is highly improbable that the Court would be able to issue a subsequent opinion resolving the impact of its decision in this case on Measure 47 (2007) sufficiently in advance of the November 2020 General Election to be of any meaningful direction to donors, candidates and campaigns.

Hazell provides extensive guidance as to the impact on Measure 47 (2006) from any decision from the Court that overrules *Vannatta I* or modifies the Court's Article I, section 8 jurisprudence. As the Court explained in *Hazell*, "the voters intended and understood that, if and when Measure 47 becomes operative, it would do so as a whole piece of legislation, not in some piecemeal fashion" and "Measure 47 will become effective as a whole or it will not become effective at all." *Hazell*, 352 Or at 465, 468-469. The Court recently recognized in *Markley* that Measure 47 (2006)'s contribution and expenditure limitations may well run afoul of federal law and whether those provisions are enforceable is speculative, at best. *Markley*, 362 Or at 543. Finally, as the Court explicitly stated in *Hazell*, Measure 47 "will not spring to life based on events that are . . . unpredictable. A change of that magnitude will not take place in a closet." *Hazell*, 352 Or at 468-469. Given the potential impact a decision in this case could have on Measure 47 (2006) and the 2020 election campaign, the opinion should provide explicit guidance as to that impact. PPAO respectfully submits that consistent with *Hazell*, the Court should state

that its decision does not implicate Measure 47 (2006) or that the provisions of Measure 47 (2006) shall not go into effect until a subsequent ruling by the Court.

V. CONCLUSION

PPAO respectfully submits that the Court may want to consider whether it should issue an opinion in this case before the November 2020 General Election. To the extent the Court revisits its prior decisions and concludes that campaign contributions and expenditures are not protected expression under the Oregon Constitution, the Court should clarify what impact, if any, that would have on Measure 47 (2006).

DATED this 7th day of August, 2019.

STOLL STOLL BERNE LOKTING &
SHLACHTER P.C.

By: s/ Steven C. Berman
Steven C. Berman, OSB No. 951769
Nadia H. Dahab, OSB No. 125630
Lydia Anderson-Dana, OSB No. 166167

209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: sberman@stollberne.com
ndahab@stollberne.com
landersondana@stollberne.com

Attorneys for *Amicus Curiae* Planned
Parenthood Advocates of Oregon

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 5315.

I certify that the size of the type in this brief is not smaller than 14-point for both the text of the brief and footnotes.

DATED this 7th day of August, 2019.

**STOLL STOLL BERNE LOKTING &
SHLACHTER P.C.**

By: s/ Steven C. Berman

Steven C. Berman, OSB No. 951769

Nadia H. Dahab, OSB No. 125630

Lydia Anderson-Dana, OSB No. 166167

209 SW Oak Street, Suite 500

Portland, OR 97204

Telephone: (503) 227-1600

Facsimile: (503) 227-6840

Email: sberman@stollberne.com

ndahab@stollberne.com

landersondana@stollberne.com

Attorneys for *Amicus Curiae* Planned
Parenthood Advocates of Oregon

CERTIFICATE OF FILING AND SERVICE

I certify that on August 7, 2019, I filed the original of **BRIEF OF AMICUS CURIAE PLANNED PARENTHOOD ADVOCATES OF OREGON** with the State Court Administrator in .pdf, text-searchable format using the Oregon Appellate eCourt filing system in compliance with ORAP 16, as adopted by the Supreme Court.

Participants in this case who are registered eFilers will be served via the electronic mail function of the eFiling system.

I further certify that on August 7, 2019, I served a true and correct copies of said document on the party or parties listed below, via first class mail, postage prepaid, and addressed as follows if they are not already registered under the Oregon Appellate Court eFiling system:

Adam A. Kiel
Kafoury & McDougal
411 SW 2nd Avenue, Suite 200
Portland, OR 97204

Attorney for Amicus Curiae Derek Cressman; Sightline Institute; Unite Oregon; Asian Pacific American Network of Oregon (APANO); Portland Jobs with Justice; Alliance for Democracy, Portland; Portland Forward; Bernie PDX; League of Women Voters of Oregon; and League of Women Voters of Portland

Daniel Belknap Bartz
3418 Kinsrow Avenue #175
Eugene, OR 97401

Attorneys for Amicus Curiae American Civil Liberties Union Foundation of Oregon, Inc.

STOLL STOLL BERNE LOKTING &
SHLACHTER P.C.

By: s/ Steven C. Berman

Steven C. Berman, OSB No. 951769

Nadia H. Dahab, OSB No. 125630

Lydia Anderson-Dana, OSB No. 166167

209 SW Oak Street, Suite 500

Portland, OR 97204

Telephone: (503) 227-1600

Facsimile: (503) 227-6840

Email: sberman@stollberne.com

ndahab@stollberne.com

landersondana@stollberne.com

Attorneys for *Amicus Curiae* Planned
Parenthood Advocates of Oregon